(16) (15)

Nos. 91-261 & 91-274

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,

*Petitioner*,

*v.*

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et alia*,

*Respondents*.

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MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC.,

*Petitioners*,

*v.*

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et alia*,

*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

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## BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF RESPONDENTS

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September 1992

[Continued on inside cover]

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## INTRODUCTION

Pursuant to Rule 37.3 of the Rules of this Court, the National Right to Work Legal Defense Foundation, Inc. ("Foundation") files this brief *amicus curiae* in support of respondents. All of the parties have consented to the filing of this brief; and their letters of consent have been filed with the Court.

## INTEREST OF THE *AMICUS CURIAE*

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, have suffered violations of their right to work; freedoms of association, speech, and religion; rights to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several States.

The Foundation has supported the most recent of this Court's major cases involving the rights of employees to refrain from joining or supporting labor organizations as a condition of employment.[1] In hundreds of other cases throughout the country, the Foundation is now aiding employees who seek to limit their forced associations with unions.

The Foundation is concerned with the cases here for review, because the Project Labor Agreement ("PLA") and Bid Specification 13.1 ("BS 13.1") of petitioner Massachusetts Water Resources Authority ("MWRA"), if sustained, would impose the primary badges and incidents of compulsory unionism—exclusive union representation and the mandatory payment of union dues

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[1] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Ellis v. BRAC, 466 U.S. 435 (1984); Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984); Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986); Communications Workers v. Beck, 487 U.S. 735 (1988); and Lehnert v. Ferris Faculty Ass'n, __U.S.__, 111 S. Ct. 1950 (1991).

and fees—on every nonunion construction worker employed on the Boston Harbor Project, in violation of those workers' rights under both the National Labor Relations Act ("NLRA") and the Constitution of the United States. The Foundation presumes that respondents will adequately present the position of the nonunion *contractors* aggrieved by the PLA and BS 13.1, but remains concerned that, without its participation as *amicus curiae*, this Court will be denied the opportunity to view the issues from the special perspective of the nonunion *employees* involved, as well. All too often, situations involving compulsory unionism appear superficially as struggles between the impersonal collectives "labor" and "management", when closer inspection reveals that the vital interests of real people are at stake, too. The Foundation's brief *amicus* focusses on these interests.

## SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the Court of Appeals for two reasons. *First*, as the undeniable products of the MWRA's *governmental* action, BS 13.1 and the PLA it enforces improperly condition the awards of public construction contracts on the surrender by nonunion employers and employees of their federal statutory *and constitutional* rights to operate and work on a nonunion basis. Thus, BS 13.1 offends the Constitution, not only under the doctrine of pre-emption (as the Court of Appeals rightly held),[2] but also as an affirmative violation of the constitutional rights of nonunion employers and employees to contract for employment on their own terms,[3] and to refuse to associate with unions.[4]

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[2] U.S. Const. art. VI, cl. 2.

[3] *See* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 251 (1917) (due-process right).

[4] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (First-Amendment right).



*Second*, because of its nature as a *governmental* agency, the MWRA may not interpose NLRA § 8(f) as a purported license for BS 13.1 and the PLA, on the plea that it (the MWRA) is acting in a merely "proprietary" capacity. For § 8(f) creates or recognizes no rights for *governmental* entities to impose compulsory unionism on private parties. And, in any event, in promulgating BS 13.1 the MWRA functioned not as a "proprietor" buying private services in a "free market" for the public's best advantage, but as a *regulator* discriminatorily promoting the economic interests of local unions by coercively substituting for "free-market" forces in the letting of public contracts a scheme of special political privileges.

## ARGUMENT

Petitioners' fundamental error lies in their assertion that

> [r]ead as a whole, with particular attention to those of its provisions that distinguish the states from private parties, the NLRA embodies an intent that, when the states act as persons engaged in proprietary conduct for proprietary reasons, they should have, if anything, more freedom than private parties in matters affecting labor relations, not less.[5]

The error is threefold: *First*, although nothing in the NLRA prevents *private* purchasers from taking many proprietary actions,

> *government* occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. * * * The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. * * *

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[5] Brief for Petitioners ("BP") at 19.

> The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.[6]

*Second*, beyond the NLRA, the Constitution imposes on the States restrictions inapplicable to private parties.[7] *And third*, the mere label a State affixes to an exercise of power, or to the capacity in which it acts, cannot immunize its wrongful behavior from condemnation under either the NLRA or the Constitution.[8]

Therefore, extremely misleading is petitioners' insistence that the Court review this case from the perspective that,

> when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not "regulate" the workings of the market forces that Congress expected to find; it exemplifies them.[9]

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[6] Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 290 (1986) (emphasis supplied).

[7] *E.g.*, Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[8] *NLRA*: *See* Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 287 (1986) (whether State's action "is an exercise of [its] spending power rather than its regulatory power" is "a distinction without a difference" where action conflicts with NLRA). *Constitution*: *See, e.g.*, City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 173-74 & n.5 (1976).

[9] BP at 24, *quoting* Associated Builders & Contractors of Massachusetts/Rhode Island, Inc. v. Massachusetts Water Resources Auth., 935 F.2d 345, 361 (1st Cir. 1991) (Breyer, C.J., dissenting). Petitioners call this "the heart of the matter". BP at 24.



For petitioners carefully refrain from acknowledging the key distinctions that:

- Although in NLRA §§ 8(e) and 8(f) Congress authorized arrangements analogous to the PLA, *if* those arrangements derived from free collective bargaining between private parties subject to the workings of market forces, it never licensed the States to condition the privilege of private employers and their nonunionized employees to work under public contracts on the latters' forced acquiescence in such arrangements. And,

- Although the congressional acceptance of NLRA §§ 8(e) and 8(f) arrangements reflects a portion of the common-law freedom private employers, employees, and unions enjoyed prior to enactment of the NLRA to structure their contractual relationships as they saw fit, in BS 13.1 the MWRA purported to exercise a governmental power to discriminate in favor of compulsory unionism that the Constitution withholds.

These pivotal distinctions support the result reached by the Court of Appeals, albeit on broader, more fundamental grounds.

## I. Bid Specification 13.1 conditions the receipt of a public benefit on the surrender by nonunion employers and employees of their federal statutory and constitutional rights to operate on a nonunion basis.

Viewed from the perspective that *governmental* action is involved, BS 13.1 self-evidently implicates the familiar "unconstitutional-conditions" doctrine: the MWRA has explicitly and unequivocally conditioned the award of a public benefit (a contract or subcontract on the Boston Harbor Project) on the surrender by nonunion employers and their employees of their

federal statutory and constitutional rights to operate on a nonunion basis.[10]

A. Pertinent here are the provisions of the PLA requiring that:

- nonunion employers must recognize petitioner Building and Construction Trades Council ("BCTC") as "the sole and exclusive bargaining representative of all craft employees working on facilities within the scope of th[e PLA]", thereby subordinating their nonunion employees to the BCTC in that capacity;[11] and

- nonunion employees "shall be subject to the union security provisions contained in the applicable Schedule A's and B's" of the PLA.[12]

Reference to the latter schedules exposes the true meaning of these "union security provisions":

- "*Section 2.* * * * All present employees who are not members of the Union and all employees who are hired hereafter for work * * * shall become and remain members in good standing by the payment of the required initiation fee and regular monthly dues * * * , and shall thereafter maintain such good dues standing for the term of this Agreement."

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[10] "[E]ach successful bidder and any and all level of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the * * * [PLA] * * * , and will be bound by the provisions of that agreement in the same manner as any other provision of the contract." MWRA Pet. App. at 141a-42a.

[11] PLA art. III, § 1, *in* MWRA Pet. App. at 116a.

[12] PLA art. III, § 4, *in* MWRA Pet. App. at 117a.



- "*Section 1.* The Employer agrees that all employees * * * shall, as a condition of employment, become and remain members of the Union in good standing. No worker shall be refused admittance and the right to maintain membership in the Union provided he qualifies and complies with the Constitution and By-Laws of the Union.

  "*Section 2.* All workers employed by the Employer for a period of seven (7) days * * * within the unit * * * shall, as a condition of employment, tender the full and uniform admission fees in effect in the Union. All workers accepted into membership shall thereafter maintain their membership in good standing in the Union as a condition of employment."

- "The Employer agrees that it shall be a condition of continued employment for an employee to become and remain a member of the Union after seven (7) days of the signing of this Agreement or after seven (7) days after the commencement of his employment, whichever is later."

- "Subject to applicable law, all employees who are members of the Union in good standing * * * shall, as a condition of employment maintain their membership in the Union in good standing throughout the life of this Agreement. All other employees shall, subject to the laws and regulations of the Union, become members of the Union * * * and shall maintain their membership in the Union in good standing as a condition of employment."[13]

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[13] Building and Site Construction Agreement between Massachusetts Laborers' District Council and Associated General Contractors of Massachusetts, Inc., art. II, § 2; Agreement between Boston District Council of Carpenters Local Unions 33, 40, 67 and 218 and Associated General Contractors of Massachusetts, Inc., art. III, at 7; Agreement Between Bricklayers &

In effect, then, BS 13.1 imposes on nonunion employers as a condition of being awarded a contract or subcontract the requirements that they surrender their federal statutory rights under the NLRA to refuse to recognize and bargain collectively with a union not designated by a majority of their employees or certified by the National Labor Relations Board ("NLRB") after an election.[14] And it imposes on nonunion employees as a condition of being hired under such a contract or subcontract that they surrender their rights under the NLRA "to refrain from any or all [concerted] activities"[15]—in particular, their rights to avoid unwanted representation by a union[16] and inclusion in a "union-security" arrangement mandating the payment of fees to a union.[17]

Furthermore, BS 13.1 impinges on the constitutional rights of nonunion employers and employees to contract for employ-

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Allied Craftsmen District Council and Building Trades Employers' Association of Boston and Eastern Massachusetts, Inc., art. XII, § 1, at 13; *and* Agreement Between Boston Insulation Contractors Association and Asbestos Workers, Local No. 6 of Boston, art. X, ¶ 3. The first of these appears as a "Representative Local Union Contract Incorporated by Reference in [the PLA]", *Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, No. 90-1392 (1st Cir.), Joint Appendix, Vol. 4, at 92. The others are "incorporated [in the PLA] by reference as if fully set forth", and "may be examined at the address specified in the Advertisement for Bids where Documents may be obtained and are available upon request". *Id.* at 43.

[14] *See* NLRA §§ 8(a)(5), 8(b)(3), 9.

[15] NLRA § 7. Activities employees may eschew include "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection".

[16] *See* NLRA § 9.

[17] *See* NLRA § 8(a)(3).



ment on their own terms,[18] and to refuse to associate with unions.[19]

B. Petitioners pretend that

> [n]either the Project Agreement nor Specification 13.1 restricts the bidding to "union" contractors. Rather, the agreement specifies that any qualified bidder is free to compete for a contract, without regard to whether the bidder has any preexisting bargaining relationship with a union, and without regard to the bidder's willingness to sign any other agreement with a union.[20]

In fact, however, the PLA and BS 13.1 compel nonunion bidders to *become* "'union' contractors" as an inflexible, unavoidable condition precedent to and consequence of being awarded a contract or subcontract. *Sotto voce*, petitioners admit as much when they advance the "take-it-or-leave-it" argument that,

> [c]onfronted with such a purchaser [as the MWRA, which chooses to do business only with construction contractors willing to enter into a union-only project agreement], those contractors who do not normally enter such agreements, *can alter their normal operating methods to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement.*[21]

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[18] *See* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 251 (1917).

[19] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). Although not employees, respondents may vicariously assert the constitutional rights of their employees in this case. *See, e.g.*, Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 956-59 (1984).

[20] BP at 8.

[21] *Id.* at 36 (emphasis supplied).

Moreover, that an otherwise qualified nonunion bidder may compete for contracts "without regard to * * * any *preexisting* bargaining relationship with a union" or "to the bidder's willingness to sign any *other* agreement with a union" is palpably irrelevant to the requirement that the bidder enter into a prescribed future bargaining relationship and agreement with a union specifically as to the Boston Harbor Project.[22]

Petitioners further disingenuously contend that

> "nonunion employees are not frozen out of the job market by . . . agreements" such as this one. * * * "Even where construction unions successfully negotiate collective-bargaining agreements that require . . . contractors and subcontractors to obtain their labor from union hiring halls, the union must refer both members and nonmembers to available jobs."[23]

The PLA and BS 13.1, however, precisely "fr[eeze] out of the job market" nonunion employees *qua* ***nonunion*** employees. For although they might possibly be hired on a nondiscriminatory basis through the union hiring halls,[24] under the PLA nonunion employees thereafter automatically and unavoidably are subjected to unwanted union representation and "membership"—the

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[22] Self-evidently, "one is not to have the exercise of his [constitutional rights] in appropriate places abridged on the plea that [they] may be exercised in some other place". Schneider v. Town of Irvington, 308 U.S. 147, 163 (1939).

[23] BP at 8, *quoting* Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 664-65 & n.18 (1982).

[24] The theoretically nondiscriminatory operation of union hiring halls often obscures their practical effect as a mechanism for imposing compulsory unionism through *de facto* "closed-shop" practices. *See, e.g.*, T.R. Haggard, *Compulsory Unionism, the NLRB, and the Courts: A Legal Analysis of Union Security Agreements*, Labor Relations and Public Policy Series No. 15 (U. Pa., Industrial Research Unit, 1977), at 97-113.



sum of which imposes on them the badges and incidents of unionism most practically onerous from the perspective of their acquiring and retaining employment.

Petitioners also attempt in three ways to camouflage how these arrangements oppress nonunion employees. *First*, they proffer as "an added safeguard" that "the union security provisions of the agreement may only require employees to undertake certain financial obligations of membership, and may not require membership itself".[25] A correct statement of the law[26] in a brief filed with this Court hardly mitigates the infringement of nonunion employees' rights on the Boston Harbor job site, however.[27]

For the PLA and its included Schedules themselves explicitly impose union-*membership* conditions far beyond what the NLRA or the Constitution allows. Self-evidently, the typical construction worker, unfamiliar with the legal labyrinth of "union-security" litigation, will read the Schedules to require what they say: namely, that he become a "member[ ] of the Union in good standing", that he "qualif[y] and compl[y] with the Constitution and By-Laws of the Union", that he "tender the full and uniform admission fees in effect in the Union", that he "subject [himself] to the laws and regulations of the Union", and that he remain a full union member throughout his employment on the Boston Harbor Project—in short, that he surrender his fundamental rights in ways even petitioners admit they cannot command. Certainly the United States so reads the

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[25] BP at 8-9 n.4.

[26] *See* Communications Workers v. Beck, 487 U.S. 735 (1988) (NLRA); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (public employment).

[27] And petitioners' statement is correct only in the most general sense, as it artfully leaves undefined what the "certain financial obligations" are.

Schedules.[28] In actuality, then, the *real* "added safeguard to employees" petitioners extol is that nonunion employees desirous of reconciling their jobs with their right to minimize forced association with unions may, if they are sufficiently practiced in the pilpulism of labor-relations law to comprehend their rights at all, bring time-consuming and expensive lawsuits to challenge the extent of the PLA's "union-security" provision![29]

*Second*, petitioners offer that

> employees working under a prehire contract may, notwithstanding the agreement, petition the NLRB at any time for an election to decertify their bargaining representative or deauthorize that representative from * * * enforcing any union security requirements.[30]

Again, the theoretical correctness of this observation merely highlights the practical-*cum*-constitutional burden the PLA and BS 13.1 impose on each nonunion employee. To obtain relief, the employee must either waive his nonunion status (thereby surrendering his right of nonassociation) or organize enough of his fellow-employees to trudge through the NLRB's protracted election-procedures to win back what is his as a matter of right (thereby being forced to exercise his right of association).[31]

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[28] *See* Brief for the United States as Amicus Curiae [at the Petition Stage] at 3 (emphasis supplied): The PLA requires nonunion contractors "to require hired workers *to join* the relevant union within seven days".

[29] The landmark *Beck* case, for example, consumed *twelve years* in litigation. *See* 487 U.S. at 739.

[30] BP at 9 n.4.

[31] Petitioners' suggestion is particularly cynical, as the traditional apology for NLRA §§ 8(e) and 8(f) is that organization of employees is peculiarly difficult in the construction industry. *See* BP at 9, *citing* S. Rep. No. 187, 86th Cong., 1st Sess. 55-56 (1959); NLRB v. Local 103, Iron Workers, 434 U.S. 335, 348-49 (1978).



*And third*, petitioners paint "the scope and effects of these arrangements" as "narrowly tailored to confine their impact to the Boston Harbor Project".[32] This case would not be here on a writ of certiorari, however, were it so parochial. In fact, the issue of the use by state agencies of project labor agreements fostering compulsory unionism has nationwide impact.[33] Furthermore, viewed from a nationwide perspective, resolving the issue as petitioners urge would have a massively disproportionate effect on nonunion employees, who constitute the great majority of construction workers in the country.[34]

C. This Court has held, again and again, that no governmental agency may condition the receipt of public benefits on an

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[32] BP at 26.

[33] In addition to the decision of the First Circuit here for review, *see* Phoenix Eng'g, Inc. v. MK-Ferguson Co., 1992 WL 125001 (6th Cir. 11 June 1992); Associated Builders & Contractors, Inc. v. City of Seward, 1992 WL 118875 (9th Cir. 5 June 1992); Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367 (8th Cir. 1991).

[34] Petitioners tell the Court that "[u]nion members comprise a large portion of the construction labor force in the Boston area. Unionized contractors perform more than 75 percent of the commercial construction work in the area." BP at 5. If true for Boston, these figures do not represent the situation nationally. "[B]etween 1966 and 1986 the percentage of all workers in construction who were union members plummeted 19.4 percentage points, a 47 percent decline." By 1986, only 22% of the workers in all construction occupations were union members; and only 23.4% of the workers in those occupations were covered by collective-bargaining agreements. Indeed, "[u]nionized blue-collar construction workers have lost so much of the market to the nonunion sector over the past decade that if this trend continues another five to ten years, they will no longer be a significant factor in labor markets." Allen, *Declining Unionization in Construction: The Facts and the Reasons*, 41 Indus. & Lab. Rel. Rev. 343, 346, 345 (Table I), 349 (1988).

individual's surrender of constitutional rights,[35] whether those benefits are labelled "rights" or "privileges".[36] Perforce of the Supremacy Clause,[37] this doctrine applies, as well, to attempts by state and local agencies to compel waivers of federal statutory rights.[38] Here, BS 13.1 imposes precisely such an unconstitutional condition on receipt of the public benefit of a contract or subcontract on the Boston Harbor Project. And for this improper condition, petitioners can interpose no excuse.

*First*, petitioners cannot rely on a congressional license for project labor agreements under NLRA §§ 8(e) and 8(f), because that allowance extends only to *private* employers.[39] And, in any

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[35] *E.g.*, Branti v. Finkel, 445 U.S. 507, 513-16 (1980); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-34 (1977); Perry v. Sinderman, 408 U.S. 593, 597 (1972); Graham v. Richardson, 403 U.S. 365, 374-75 (1971); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Whitehall v. Elkins, 389 U.S. 54, 59-62 (1967); United States v. Robel, 389 U.S. 258, 263-66 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967); Elfbrandt v. Russell, 384 U.S. 11, 17-19 (1966); Baggett v. Bullitt, 377 U.S. 360, 379-80 (1964); Sherbert v. Verner, 374 U.S. 398, 404-06 (1963); Cramp v. Board of Public Instruction, 368 U.S. 278, 288 (1961); Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961); Shelton v. Tucker, 364 U.S. 479, 485-86 (1960); Speiser v. Randall, 357 U.S. 513, 518-20 (1958); Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956); Wieman v. Updegraff, 344 U.S. 183, 192 (1952); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 630-31 (1943).

[36] *E.g.*, Board of Regents v. Roth, 408 U.S. 564, 571 & n.9 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971).

[37] U.S. Const. art. VI, cl. 2.

[38] *Cf.* Felder v. Casey, 487 U.S. 131 (1988) (State may not condition access to its courts for purpose of litigating federal claim under 42 U.S.C. § 1983 on litigant's compliance with State's "notice-of-claim" law).

[39] *Compare* NLRA §§ 8(e) ("nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry") *and* 8(f) (not "an unfair labor practice • • • for an employer engaged



event, petitioners emphasize that the MWRA "is not purporting to act as [an employer]; nor does the legal validity of its actions depend on [its] being an 'employer' ".[40] On the other hand, petitioners cannot rely on the PLA's being "a collective bargaining agreement between Kaiser—undeniably an 'employer' for purposes of [NLRA §§ 8(e) and 8(f)]—and the BCTC", which is a "labor organization" under those sections.[41] For the mere assumed legality of the *agreement* does not compel the conclusion that *BS 13.1* is derivatively lawful, too.[42] After all, even

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primarily in the building and construction industry" to make such an agreement) *with* NLRA § 2(2) ("term 'employer' • • • shall not include • • • any State or political subdivision thereof").

[40] BP at 28. The PLA itself recites that "[n]one of the provisions [therein] shall apply to the [MWRA]". Art. II, § 7, *in* MWRA Pet. App. at 115a.

[41] *Pace* BP at 28.

[42] *Amicus* describes the legality of the PLA as merely "assumed", because no one has focussed on the possibility—or, *Amicus* suggests, the compelling argument—that the agreement be viewed, not as an *independent contractual* act of Kaiser in its capacity as a *private employer*, but rather as part and parcel of the MWRA's improper attempt, as a *governmental agency*, to *regulate* the Boston construction industry to the special advantage of the BCTC. Yet, as petitioners themselves recite the relevant history, the MWRA affirmatively

> sought Kaiser's recommendations for a labor relations plan • • • . Kaiser responded by recommending that the Project be governed by a master labor agreement • • • .
>
> In response to those recommendations, the [MWRA] authorized Kaiser to attempt to negotiate such a "project labor agreement" with the BCTC • • • . The [MWRA] reserved the right to approve the final agreement.
>
> • • • •
>
> • • • [T]he [MWRA's] Board of Directors approved the Project Agreement and determined that the project work should be carried out according to the Agreement's terms. To give effect to this decision, the [MWRA] incorporated Bid Specification 13.1 into its solicitation of bids

were the PLA arguably the result of the free collective bargaining between *private* parties that Congress enacted NLRA §§ 8(e) and 8(f) to foster, BS 13.1 remains undeniably a *governmental* mandate that *dispenses* with free (or even any) collective bargaining between nonunion contractors and subcontractors and the BCTC (or any other labor organization), and instead *dictates* the unique form labor relations must take on the Boston Harbor Project.

*Second*, petitioners may not avoid the absence of a license in NRLA §§ 8(e) and 8(f) for the MWRA's *governmental*, *nonemployer* action by glibly asserting that the

> MWRA's purchasing decision * * * is a choice by *a* purchaser of construction services to take advantage of an option that Congress intentionally made available to *such* purchasers[,]

and that the MWRA was

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for work on the Project.

BP at 6-7. The PLA itself states that

> [i]t is understood by the parties to this Agreement that it is the policy of the [MWRA] * * * that the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement.

MWRA Pet. App. at 109a. Certainly, this course of events and understanding by all parties strongly supports the conclusion that Kaiser's real role was, not to make purely economic decisions informed by free-market forces, but instead to implement through the PLA the MWRA's political policy later explicitly embodied in BS 13.1.

Inasmuch as important constitutional rights are involved here, this Court may (and, indeed, should) independently review the record and make its own assessment of these "constitutional facts". *See, e.g.*, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).



> acting in its proprietary capacity *as a property owner purchasing construction services in order to develop its property*. Its role is no different from that often—and lawfully—played by private owners of construction projects who choose to have the construction services they purchase performed under a project labor agreement in order to further their economic interests.[43]

For this apology simply begs the interrelated questions of whether:

- in enacting the special privileges of §§ 8(e)and 8(f) for "purchaser[s] of construction services" in the *private* sector, Congress foresaw and intended *both* that "purchasers" would be the parties demanding project labor agreements *and* that the class of such "purchasers" would include *public*—as well as private-sector buyers;[44] and

- in promulgating BS 13.1, the MWRA, perforce of its *governmental* character, played a "role" necessarily different in kind from any private owner of a construction project.

These questions demand analysis, not simply assumed answers, because the supposed legitimacy of BS 13.1 cannot derive from the mere self-serving description of the MWRA's having "act[ed] in its proprietary capacity *as a property owner purchasing construction services in order to develop its property*". True, "state action in the nature of 'market participation' is not

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[43] BP at 24 (emphasis supplied), 28 (emphasis in the original).

[44] Petitioners claim legislative history evidences congressional awareness that project labor agreements were routinely used on public projects. BP at 30-33. Deliberately unclear, however, is whether any agreement to which petitioners advert paralleled BS 13.1 and the PLA. After all, governmental agencies' awards of contracts to private contractors who, independently of any governmental command or pressure, work under project labor agreements for their own (the contractors') economic reasons are critically distinguishable from awards of contracts only to private bidders who acquiesce in such agreements.

subject to the restrictions placed on state regulatory power by the Commerce Clause"—but, "[w]hat the Commerce Clause would permit States to do in the absence of the NLRA is • • • an entirely different question from what States may do with the Act in place".[45]

*Third*, and most fundamentally, petitioners cannot rely *sub silentio* on some kind of assumed legitimacy for *the MWRA's* unilateral designation of the BCTC as the exclusive representative for nonunion employees employed on the Boston Harbor Project. Even in a paradigmatically *private* case under the NLRA, exclusive representation has never received this Court's constitutional imprimatur against a due-process, much less a freedom-of-association, challenge.[46] Yet, in the paradigmatically private case, the employees themselves select (or reject) an exclusive representative by majority vote,[47] thereby exercising freedom of choice in a collective sense at least. Here, BS 13.1 and the PLA cavalierly dispense with majority votes—or even *any* participation by employees—to *impose* an exclusive repre-

[45] Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 289-90 (1986).

[46] When the constitutionality of the NLRA was first in issue, the NLRB selected its test-cases "intentionally [to] avoi[d] presenting the Court with the 'touchy' and more doubtful question[ ]" of exclusive representation. J.A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law, 1933-1937*, at 187 (1974). And in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937), this Court avoided the problem of *exclusive* representation by interpreting the statute to permit individual employees to bargain directly with their employer over the terms and conditions of their employment. *Accord*, Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 548-49 (1937) (Railway Labor Act). Only seven years later, in cases raising issues of statutory construction alone, did this Court purport to re-interpret the labor acts to preclude individual contracts under some circumstances. J.I. Case Co. v. NLRB, 321 U.S. 332, 334-39 (1944); Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 346-47 (1944). Neither of these decisions, however, reconsidered the constitutional matters discussed in *Jones & Laughlin* and *Virginian* Railway, although the statutory constructions adopted in those cases predicated their constitutional holdings. *See* Comment, *The Mechanics of Collective Bargaining*, 53 Harv. L. Rev. 745, 789-91 (1940). The later decision in *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192, 198 (1944), also pretermitted the question by creating the duty of fair representation, precisely to avoid grappling with the serious problems of due process and equal protection that exclusive representation raises. *See* Vaca v. Sipes, 386 U.S. 171, 182 (1967); Weyland, *Majority Rule in Collective Bargaining*, 45 Colum. L. Rev. 556, 568-69 (1945).



The only decision of this Court that squarely addressed exclusive representation is *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). Referring to its exclusive-representation provision as the basis for declaring unconstitutional the Bituminous Coal Conservation Act, the Court said:

> The effect, in respect of wages and hours, is to subject the dissentient minority • • • of • • • miners • • • to the will of the • • • majority • • • .
>
> • • • •
>
> The power conferred upon the majority is • • • the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. • • • [A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.

298 U.S. at 311. Concurring, Chief Justice Hughes added that

> [t]he [exclusive-representation] provision permits a group of • • • employees, according to their own views of expediency, to make rules as to hours and wages for other • • • employees who were not parties to the agreement. Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirement of due process of law.

*Id.* at 318 (separate opinion). This judicial history hardly suggests that exclusive representation is constitutionally pristine.

[47] *See* NLRA § 9(a).

sentative that, by hypothesis, nonunion employees would never accept were they afforded the right to choose.[48]

**II. The illegality of Bid Specification 13.1 cannot be ignored on the plea that the Massachusetts Water Resources Authority should have the same freedom available to it as private parties enjoy under National Labor Relations Act sections 8(e) and 8(f).**

Ultimately, petitioners' argument reduces to their rejection of the thesis that

> Congress intended to deny to the states alone, when developing their own property, the construction industry arrangements referred to in §§ 8(e) and 8(f). * * *
>
> The inference the court of appeals drew from the statutory language of a congressional desire to *decrease* the options available to public owners and developers of property—while leaving a broader range of options available to private owners and developers—is unwarranted.[49]

The notion that in NLRA §§ 8(e) and 8(f) Congress intended to "deny" rights to the States, however, grossly misreads the jurisprudence of American labor relations in its historical context.

**A.** Before enactment of the NLRA, the law of labor relations in the private sector rested on the common-law and constitutional doctrine of freedom of contract, as to both

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[48] That the second proviso to NLRA § 8(f) allows employees to vote to decertify an exclusive representative or deauthorize a "union-security" arrangement dilutes this criticism only if petitioners are correct in characterizing BS 13.1 as the act of a "proprietor" rather than a regulator—which, of course, they are not.

[49] BP at 27.



individual and collective bargaining.[50] Under freedom of contract, private employers, employees, and unions could voluntarily structure labor relations in a variety of ways, from the union-only "closed shop" at the collectivistic end of the spectrum,[51] to the nonunion so-called "yellow-dog contract" at the individualistic end.[52] *A fortiori*, these parties could adopt the type of labor agreements that NLRA §§ 8(e) and 8(f) now countenance, as these agreements are simply watered-down versions of various "closed-shop" schemes.

The present NLRA severely restricts and modifies the common-law pattern of labor relations. Of primary interest here, the "closed shop" and the true "union shop" are impermissible.[53] And the "yellow-dog contract" is also unlawful.[54]

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[50] The best survey, through comparison and contrast, of the legal landscape before and after passage of the NLRA remains Petro, *Civil Liberty, Syndicalism, and the NLRA*, 5 U. Tol. L. Rev. 447 (1974).

[51] Under a "closed-shop", an employer may hire only employees who are already members of the union. T.R. Haggard, *ante* note 24, at 4.

[52] *See, e.g.*, Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 250-53 (opinion of the Court), 269-72 (Brandeis, J., dissenting) (1917).

[53] Section 8(3) of the original NLRA allowed the "closed shop"; but this was changed in the Taft-Hartley Amendments of 1947 that created NLRA § 8(a)(3). Under a true "union-shop" arrangement, a nonunion employee may be hired, but as a condition of continued employment within a fixed period must actually join the union, becoming a "member in good standing" and subjecting himself to the union's constitution and by-laws. T.R. Haggard, *ante* note 24, at 4; *Black's Law Dictionary* 322 (4th ed. 1968). NLRA § 8(a)(3), however, allows only an "agency-shop" scheme, under which the maximum condition on the continued employment of nonunion employees is that they pay the union "dues and fees" equal to their proportionate share of the union's costs of collective bargaining on their behalf. Communications Workers v. Beck, 487 U.S. 735, 754-55 (1988).

[54] *See* NLRA § 8(a)(1, 3, 5). *See also* Norris-LaGuardia Act § 3, 29 U.S.C. § 103.

Instead, in the general case the NLRA establishes a regime of "voluntarily unionism" among employees,[55] into which it precludes employers from intervening. In the construction industry, nonetheless, NLRA §§ 8(e) and 8(f) retain a truncated part of the traditional common-law freedom for employers and unions to agree to "closed-shop"-type arrangements.[56]

In short, NLRA §§ 8(a) and 8(f) do not *grant* rights, powers, or privileges to private-sector employers or labor organizations. Rather, they immunize those parties from "unfair-labor-practice" prohibitions other sections of the act impose, prohibitions that themselves purport to deny or limit common-law and constitutional rights, powers, and privileges sounding in freedom of contract and today (with the expansion of First-Amendment jurisprudence since the 1930s) freedom of association. Whether these denials or limitations are themselves constitutionally valid this Court need not consider here. Suffice it to recognize that the exceptions embodied in NLRA §§ 8(e) and 8(f) merely revive a part of the jurisprudential *status quo ante* the 1930s for private-sector employers, employees, and unions.

**B.** In enacting these exceptions, however, Congress "deprived" the States of nothing. Neither did the Court of Appeals "deprive" the MWRA of anything by holding preempted the MWRA's intervention, under color of BS 13.1, into the process of collective bargaining through freedom of contract that the NLRA mandates.[57] For the States *never* enjoyed, nor now enjoy, any right, power, or privilege to condition grants of

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[55] *See* Pattern Makers' League v. NLRB, 473 U.S. 95, 106 (1985).

[56] Even in this license, though, the NLRA limits any "union-security" arrangement to an "agency shop", and allows the employees to decertify the union as their exclusive representative or to deny it authorization to impose an "agency-shop" requirement on them. NLRA § 8(f), first and second provisos.

[57] *E.g.*, H. K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970).



public-works contracts to private employers on the latters' acquiescence in or enforcement of the type of union-only arrangements the PLA prescribes.

*1.* Were this a case of construction performed by *the MWRA* as a *governmental* agency, the MWRA could arguably condition employment of *its own* employees on their acceptance of a process of "majority vote" to choose (or reject) union representation, in loose analogy to the scheme under NLRA § 9(a).[58] BS 13.1 and the PLA, however, directly impose such representation on the employees of *private third parties*, without even the fig-leaf of a preliminary vote among those employees—thereby clearly abridging the employees' freedom of (non)-association, absent a showing (never made here) by the MWRA that this imposition serves a compelling state interest through the means least-restrictive of the employees' First-Amendment freedoms.

*2.* Were this a case in which the MWRA conditioned grants of public contracts on private employers' agreement to recognize the rights of their employees to select (or reject) union representation by "majority vote", the condition would not be inconsistent with the basic "voluntaristic" thrust of the NLRA as expressed in §§ 8(a) and 9(a). But it would unquestionably be preempted.[59]

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[58] *Amicus* emphasizes the qualification "arguably", because the analogy of public-sector to private-sector labor relations is loose at best, and ultimately unpersuasive on the merits. *See, e.g.*, Petro, *Sovereignty and Compulsory Public-Sector Bargaining*, 10 Wake Forest L. Rev. 25 (1974); E. Vieira, Jr., *To Break and Control the Violence of Faction: The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (Foundation for Advancement of the Public Trust, 1980); Vieira, *Of Syndicalism, Slavery and the Thirteenth Amendment: The Unconstitutionality of "Exclusive Representation" in Public-Sector Employment*, 12 Wake Forest L. Rev. 515 (1976).

[59] *See, e.g.*, Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282 (1986).

*3.* Here, BS 13.1 and the PLA combine the worst aspects of the preceding two cases, in that the MWRA, a governmental agency, has directly imposed on third-party private employers and employees compulsory unionism, *in contravention of* the NLRA's policies that: (i) free collective bargaining between employers and unions, not governmental dictation, should determine the substance of labor-management agreements, even under NLRA §§ 8(e) and 8(f);[60] and (ii) from the very beginning, unionism should reflect the voluntary choices of the employees themselves, except where employers and unions freely negotiate a § 8(f) agreement. Described in these stark terms—as reality demands—BS 13.1 *must* be disallowed under the preemption doctrine, if the basic purposes of the NLRA are to be advanced.

*4.* Moreover, as the explicit terms of the "union-security" agreements in the Schedules to the PLA evidence,[61] BS 13.1 clearly violates the first proviso of NLRA § 8(f), and is therefore affirmatively illegal under the act, not (as petitioners claim) an innocent attempt by the MWRA to enjoy lawful options available to private parties.

In sum, invalidation of BS 13.1 deprives the MWRA of no rights, powers, or privileges—but instead thwarts its usurpation of powers lacking a source in traditional common law, illegal under and at best subversive of the NLRA, and surely beyond constitutional limitations in any event.

*C.* Finally, unable to find substantial solace in the law, in a *tour de force* of self-contradictory reasoning petitioners invoke the "*free* market" to rationalize their imposition of *compulsory* unionism. BS 13.1 and the PLA, they say, exemplify "the 'free

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[60] *See* Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986).

[61] *Ante* pp. 6-7.



play of economic forces' that Congress intended to govern construction industry labor relations".[62]

If the MWRA accepted bids from contractors irrespective of whether they operated on a nonunion or union basis—thus, leaving to them the choice to negotiate an NLRA § 8(f) agreement *vel non*—it could fairly be described as participating in a "free market", notwithstanding its character as a governmental agency. Conversely, where (as here) the MWRA effectively outlaws bids by contractors who refuse to eschew nonunion operations, it thwarts the operation of the "free market", by hypothesis.[63]

At base, the real reason for BS 13.1 relates to "free markets" only in that union contractors can no longer compete against nonunion contractors in the economic realm without *political* assistance. The tremendous losses unionized contractors have suffered in market share over the past decades, labor-economists explain,

> have an important implication for the future of unionism in construction. Wage givebacks are not likely to help restore much of the market share lost in recent years to the open shop. The productivity advantage of union contractors has eroded to such a degree that the size of wage cuts needed to restore a balance between the wage and productivity

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[62] BP at 24.

[63] The government acts consistently with the "free market" where it protects private property and enforces the bargains at which private parties arrive through exercises of their freedom of contract. Governmental intervention that circumscribes the rights of private property, or narrows the field for free contracts, on the other hand, is antithetical to the "free market". The Constitution may permit such intervention in the public interest, provided it has a rational basis, and satisfies the compelling-state-interest and least-restrictive-alternative tests where fundamental freedoms are concerned. But it offends fair discourse to claim (as petitioners do) that, because it is legally permissible to *override* "free-market" choices, such intervention is *part of* the "free market".

> gaps is unlikely to be acceptable to the rank-and-file. Instead, the focus of both union leaders and unionized contractors must be on rebuilding the union productivity advantage.[64]

Absent such problematic and long-term "rebuilding", construction unions and union contractors have only one immediate alternative to gradual extinction by the market forces upon which petitioners feign reliance: *political* monopolization of the construction market, which in the arena of public-sector construction takes the form of alliances with governmental authorities to seize through regulation (deceptively mislabelled as "purchasing decisions", as in this case) what the unions and unionized contractors cannot win through fair competition in the "free market" they pretend to praise and espouse. Thus, properly scrutinized, BS 13.1 stands out as a naked example of "rent-seeking" by special-interest groups in collusion with public officials (that is, the use of governmental intervention to obtain returns for those groups above and beyond what they could earn in the "free market"), not "the 'free play of economic forces' that Congress intended" in the NLRA and that petitioners disingenuously appropriate to disguise what they are really about.

C. The "rent-seeking" in this case is particularly odious because of its extortionate nature. Bluntly put, the PLA exemplifies the "protection racket" in operation in the construction industry, with a governmental agency serving as the procurer and enforcer. As petitioners themselves explain, the Boston Harbor Project is subject to "numerous detailed [court] orders * * * making no allowance for delays from * * * labor disputes". During the ten-year life of the project, many collective-bargaining agreements of unionized contractors "will be up for renegotiation numerous times"; "[e]ach renegotiation creates a potential for a strike or other form of lawful concerted action"; and "a strike and picketing by one union potentially

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[64] Allen, *ante* note 34, at 359.



could halt the work of a number of contractors". Thus, the purpose of the PLA was to "promote labor harmony" uniquely with the BCTC, by requiring all contractors to recognize "the BCTC as the exclusive bargaining agent of all craft employees on the Project"—lest the BCTC unleash "labor unrest" upon the citizens of Boston.[65]

> On practical grounds, the Court of Appeals was rightly
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> skeptical of the *pax industrial* which the [PLA] utopically promotes. This peaceable kingdom may be somewhat less than attainable considering that this contract is no bar to rival, or for that matter, anti-union, activity. *See* 29 U.S.C. § 158(f), *last proviso*.[66]

On constitutional grounds, this Court should be more than just skeptical, because the sweetheart deal among the MWRA, Kaiser, and the BCTC rewards the BCTC and unionized contractors with valuable public benefits at the expense of nonunion contractors and nonunion employees, who lose their constitutional rights to operate on a nonunion basis.[67]

Were the PLA an ordinance mandating special privileges for unions in the letting of public contracts, its antagonism to the public interest would be patent. For such blatant *pro*-union favoritism flies in the face of "'the primary duty of * * * public

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[65] BP at 3-4, 5-6 (footnote omitted), 7.

[66] 935 F.2d at 354. Petitioners themselves fuel such skepticism, when they tout as a "safeguard" the right of nonunion employees the PLA shanghais into the BCTC to "petition the NLRB at any time for an election to decertify their bargaining representative or deauthorize that representative from negotiating or enforcing any union security requirements". BP at 8-9 n.4.

[67] That the BCTC waives the right to strike during the life of the PLA does not sanctify the scheme. Petitioners would need to show that a "project agreement" *not* imposing compulsory unionism, but requiring a no-strike pledge from the employees of each successful bidder, was impractical.

officers * * * to secure the most advantageous contract[s] possible for accomplishing the work under their direction'";[68] squanders public funds by preventing competition;[69] and exceeds the proper discretion of public officials.[70] This should be

> too clear for argument. Government is instituted for the benefit of all the people and not for the benefit of any one class to the exclusion of others. * * * [B]ut just in proportion as competition is restricted, and the award [of a public contract] is hedged about with express or implied conditions by which a favored person or a favored class is insured a preference over others of equal ability and capacity, public rights are imperiled and public interests are sacrificed. Such discrimination tends to monopoly, and involves a denial of the equality of right and of opportunity which lies at the foundation of republican institutions. * * *
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> * * * The citizen may be * * * union or non-union upon the labor question; * * * Republican, Democrat, or Prohibitionist in political affiliation; but * * * he is neither more nor less than a citizen of the state, entitled to an equal opportunity therein according to the capacity and ability with which nature may have endowed him. In denying him that opportunity a double wrong is perpetrated, first, upon the individual who is entitled to be considered upon his personal merits uninfluenced by these extrinsic considera-

[68] Upchurch v. Adelsberger, 332 S.W.2d 242, 243 (Ark. 1960).

[69] Miller v. City of Des Moines, 143 Iowa 409, 420, 122 N.W. 226, 230 (1909). *Accord*, Master Printers Ass'n v. Board of Trustees, 356 F. Supp. 1355, 1357-58 (N.D. Ill. 1973); Wright v. Hoctor, 95 Neb. 342, 348, 145 N.W. 704, 706 (1914); Lewis v. Board of Educ., 139 Mich. 306, 310, 102 N.W. 756, 757 (1905); City of Atlanta v. Stein, 36 S.E. 932, 933-34 (Ga. 1900); Adams v. Brenan, 177 Ill. 194, 201, 52 N.E. 314, 316-17 (1898).

[70] City of Atlanta v. Stein, 36 S.E. 932, 933-34 (Ga. 1900). *See* State *ex rel.* United Dist. Heating, Inc. v. State Office Building Comm'n, 124 Ohio St. 413, 416, 179 N.E. 138, 139 (1931).



> tions; and secondly, upon the state at large, whose expenses are multiplied, and whose integrity [is] jeopardized by a system of favoritism, the demoralizing effect of which is patent to every thoughtful student of public affairs. * * * The mischief is * * * in its tendency and in the far-reaching consequences of legitimizing a system or practice so pregnant with evil possibilities.[71]

That the MWRA, Kaiser, and the BCTC have tried to camouflage their scheme by treating the PLA as a "private" arrangement to secure "labor peace", which BS 13.1 merely adopts, mitigates the mischief not at all. For the undeniable reality is that BS 13.1 constitutes a directive of public policy—and *the very nature of government requires above all else that threats by private groups be absolutely excluded from the catalogue of reasons that public officials may advance in support of actions that peculiarly benefit those groups at the expense of other segments of society.* In the private sector, both employers and unions may use economic coercion as a weapon to obtain so-called "bargaining power" against each other.[72] But this cannot translate into a license for the BCTC, by threatening to shut down the Boston Harbor Project with strikes and picketing, to misuse a *governmental* agency to drive from remunerative employment all other persons who will not accept its brand of compulsory unionism.[73] Besides the inapplicability of the

[71] Miller v. City of Des Moines, 143 Iowa 409, 421, 122 N.W. 226, 230-31 (1909). *Accord, e.g.*, Printing Pressmen v. Meier, 115 N.W.2d 18, 20-21 (N.D. 1962) (invalidating statute that required particular union label on public work, on grounds that logic of statute, if sustained, would allow similar monopolies for political parties).

[72] *E.g.*, American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317-18 (1965); NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 488-89 (1960).

[73] *Cf.* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 531 (1949).

"bargaining-power" theory to the government,[74] ultimately the "rights of the employees to work for whom they will" and "the right of the employer * * * to free access of such employees" are "primary" as against even a lawful strike.[75] And the duty of government at all levels is to protect these rights, not sell them out.

## CONCLUSION

The Court of Appeals correctly held BS 13.1 unconstitutional on pre-emption grounds. *Amicus* has shown that BS 13.1's unconstitutionality runs even deeper than that. For both these reasons, the judgment of the Court of Appeals should be affirmed.

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[74] *See* United States v. United Mine Workers, 330 U.S. 258, 274 (1947).

[75] American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 206 (1921).